

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-84:

STATE OF MONTANA EASTMONT HUMAN)
SERVICES CENTER,)

Petitioner,)

- vs -)

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)

Respondent.)

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended Order were issued
by Hearing Examiner Linda Skaar on April 15, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended
Order were filed by the Petitioner on May 6, 1985.

Oral argument was scheduled before the Board of Personnel Appeals on
Wednesday, July 31, 1985.

After reviewing the record and considering the briefs and oral arguments,
the Board orders as follows:

1. IT IS ORDERED that the Petitioner's Exceptions to the Findings of Fact,
Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact,
Conclusions of Law and Recommended Order of Hearing Examiner Linda Skaar as
the Final Order of this Board.

DATED this 14 day of August, 1985.

BOARD OF PERSONNEL APPEALS

BY

Alan L. Joscelyn
Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of
this document was mailed to the following on the 15 day of August, 1985:

Art McCurdy
Labor Relations Bureau
Department of Administration
Room 130 - Mitchell Building
Helena, MT 59620

Dave Stiteler
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-84

STATE OF MONTANA, EASTMONT)	
HUMAN SERVICES CENTER)	
)	FINDINGS OF FACT;
Petitioner,)	CONCLUSIONS OF LAW
)	AND
EASTMONT EDUCATORS)	RECOMMENDED ORDER
ASSOCIATION)	
)	
Respondent.)	

* * * * *

A petition for unit clarification was filed on June 1, 1984 proposing to clarify the unit comprised of developmental training specialists, special education teachers, speech pathologists, recreation specialists, recreation therapists, teacher aides and rehabilitation aides by removing one recreation therapist. Petitioner alleges that new supervisory duties have been added to this position.

A hearing was held in this matter on December 12, 1984 under the authority of Title 39, Chapter 31 and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA. Petitioner, State of Montana was represented by Caleb Mills. Emilie Loring represented the Eastmont Educators Association. Linda Skaar was hearing examiner.

After careful review of testimony and evidence presented at the hearing, I make the following findings of fact:

FINDINGS OF FACT

1. Dallas Scott has been the recreation therapist at the Eastmont Human Services Center for the past three years. As recreation therapist, Scott is in charge of the recreation program. This program unit is responsible for evaluating, planning and conducting recreation programs for severely and profoundly retarded residents. In achieving

1 the goals of the program Ms. Scott supervises the recreation
2 staff (a recreation assistant and recreation aide) and
3 coordinates center recreation activities. Specifically, she

4 1) trains and coordinates the staff in therapy
5 methods and recreation activities. This consumes
6 30% of her time.

7 2) plans, organizes and carries out recreation
8 activities for the residents. These activities
9 include motor therapy, classroom programming,
10 outings, special events, graphs and social skill
11 programming. This takes 70% of her time.

12 Scott's position was at the grade 13 level until the
13 Classification Bureau reviewed and consolidated the Recre-
14 ation Therapist series into a single class at a grade 14.
15 In response to this change in classification Superintendent
16 Sylvia Hammer determined to add supervisory duties to Ms.
17 Scott's position. To this end, management filled out a new
18 position description for Ms. Scott. This position descrip-
19 tion is almost word for word a copy of the previous position
20 description. There were no supervisory duties added to the
21 list of duties of the position. The only substantive
22 changes were the addition of the following:

23 (added to the response to the question on supervision
24 received)

25
26 Reference materials include Eastmont Human Ser-
27 vices Center Personnel Handbook and Student Rights
28 Manual, Boulder River School and Hospital Behavior
29 Management Manual, and Eastmont Human Services
30 Center Reference Library with evaluation mate-
31 rials.

32 (added to the response to the question on required
knowledges, skills and abilities).

. . .skill in providing gross motor therapy to
severely and profoundly handicapped and consulting
effectively with the physical therapist and
occupational therapist as need be. Working

knowledge of supervisory practices and procedures.
(Emphasis added).

2. Eastmont Human Services Center is organized into five departments each headed by a director. These departments are Habilitation, Medical, Community Services, Support Services and Education. The recreation program is in the Education Department which is under the direction of Barbara Jessen. The question of the supervisory status of Ms. Scott aside, none of the departments have intermediate supervisors between the director and the employees.

3. In the course of carrying out her job duties Ms. Scott assigns work to and directs the recreational assistant and the aide. In addition to these two positions, Ms. Scott directs the work of temporary summer employees.

4. At Eastmont, membership on hiring committees is not confined to those in supervisory roles. Ms. Scott recently served on a hiring committee which screened and interviewed applicants for the position of recreation aide. All members of the committee voted on the applicants. Although Ms. Jessen eventually hired the person that Scott favored there is no indication that it was because of Ms. Scott's opinion. Ms. Scott does not effectively recommend who is to be hired.

5. Ms. Scott does not have the authority to transfer employees.

6. Dallas Scott can recommend the suspension of an employee but, if possible, her supervisor and/or the Superintendent would independently investigate the situation before taking any action.

7. Education Director Barbara Jessen testified that Ms. Scott has the authority to recommend that an employee be fired. She is to have the bulk of the responsibility in

1 developing the documentation upon which the decision will be
2 made. However, several people would review the recommenda-
3 tion and the back-up material.

4 8. Ms. Jessen testified that Ms. Scott has the
5 authority to recommend a promotion but that promotions are
6 tied to the hiring process.

7 9. Ms. Jessen testified that Ms. Scott will have the
8 authority to recommend lay-off and recall.

9 10. Ms. Scott substitutes for Ms. Jessen when she is
10 absent from the center. Ms. Jessen testified that she is
11 absent from the Center some every quarter and that her
12 absences in the past year are typical. She was gone approx-
13 imately a week in June, ten days in August and two or three
14 days during the fall. Ms. Jessen testified, "That was one
15 of the things that we felt would be helpful when the issue
16 of adding that duty came up. There are a lot of schedule
17 changes that have to go on day in and day out and...there is
18 no way that I could leave enough detailed memos, 'if so and
19 so is gone send that resident to such and such a place.' We
20 felt it would improve the operation of the Education Depart-
21 ment..." Here Ms. Jessen was referring to mandated ratios
22 between residents and staff, staffing and programmatic
23 problems caused by residents being "pulled-out" for treat-
24 ment elsewhere in the Center.

25 In Jessen's absence, Scott has the authority to call in
26 substitutes or she can juggle staff and patients.
27 Ms. Jessen does not believe that Scott has called in any
28 substitutes since her upgrade to a grade 14.

29 11. Management plans to have Ms. Scott evaluate
30 employees. However, the agreement covering the employees in
31 the Education Department specifies that employee performance
32 evaluation will be done by the Education Director.

1 12. Ms. Scott cannot adjust employee grievances. The
2 contract provides that all such grievances will go to the
3 Superintendent.

4 13. While Scott was sent to a single training session
5 for supervisory personnel she does not ordinarily attend
6 meetings held for supervisory personnel nor is she regarded
7 as a supervisor by other employees.

8 DISCUSSION

9 The definition of supervisory employee contained in
10 Montana's Collective Bargaining Act for Public Employees

11 means any individual having authority in the
12 interest of the employer to hire, transfer,
13 suspend, lay off, recall, promote, discharge,
14 assign, reward, discipline other employees, having
responsibility to direct them, to adjust their
15 grievances, or effectively to recommend such
action, if in connection with the foregoing the
16 exercise of such authority is not of a merely
routine or clerical nature but requires the use of
independent judgment. [emphasis added] 39-31-
17 103(3) MCA.

18 In determining supervisory status, the responsibilities
19 of hiring, transferring etc. are considered as a whole.
20 That is, to be determined supervisory an employee must
21 exercise a number of the responsibilities listed above.

22 This case is complicated by the fact that the Eastmont
23 Human Services Center is a health care institution. At the
24 time that Congress brought non-profit hospitals under the
25 National Labor Relations Act the Senate Committee on Labor
26 and Public Welfare considered the problem of supervisory
27 status of health care professionals. The committee
28 reported:

29 SUPERVISORS

30 Various organizations representing health
31 care professionals have urged an amendment to
32 Section 2(11) of the Act so as to exclude such
professionals from the definition of "supervisor".
The Committee has studied this definition with
particular reference to health care professionals,

1 such as registered nurses, interns, residents,
2 fellows, and salaried physicians and concludes
3 that the proposed amendment is unnecessary because
4 of existing Board decision. The Committee notes
5 that the Board has carefully avoided applying the
6 definition of "supervisor" to a health care
7 professional who gives direction to other employ-
8 ees in the exercise of professional judgment,
9 which direction is incidental to the profession-
10 al's treatment of patients, and thus is not the
11 exercise of supervisory authority in the interest
12 of the employer. The Committee expects the Board
13 to continue evaluating the facts of each case in
14 this manner when making its determinations.
15 [Emphasis added].¹

16 The Board of Personnel Appeals has adapted this
17 standard and like the NLRB, it will apply the standard to
18 health care professionals who are not strictly medical
19 personnel.² The traditional indices of supervision will be
20 weighed to see whether they are being exercised in the
21 interest of the employer or in the interest of the treatment
22 of the patients.

23 An examination of those supervisory duties which
24 Ms. Scott might exercise "in the interest of the employer"
25 rather than "in the interest of the patient" shows that her
26 recommendations on the most important ones would be thor-
27 oughly reviewed before being implemented. For example, she
28 may sit on a hiring committee but her vote on an applicant
29 would have no more weight than the vote of any other member
30 of the committee. While she might recommend that an employ-
31 ee be suspended, if possible, her supervisor would conduct
32 an independent investigation before she acted. In addition,
if Scott were to recommend the termination of an employee

30 ¹Coverage of Nonprofit Hospitals Under the National
31 Labor Relations Act, S. Report 93-766, 93rd Congress, 2d
32 session, April, 2, 1974.

²Trailback, Inc., 221 NLRB 527, 91 LRRM 1037 (1975).

1 her recommendation would be thoroughly reviewed before
2 action was taken. Formal grievances must go to the
3 Superintendent.

4 Ms. Jessen testified that Ms. Scott will be evaluating
5 employees. However, the contract provides that performance
6 evaluations will be done by Jessen as Director of Education.
7 This contract provision will have to be changed before Ms.
8 Scott can assume this duty.

9 The Position Description form on Ms. Scott's position
10 completed by her supervisor states that Ms. Scott spends 70%
11 of her time planning, organizing and carrying out recreation
12 activities for the residents. Another 30% of her time is
13 spent training and coordinating the staff in therapy methods
14 and recreation activities. Even assuming that not all of
15 her time is spent on these two categories of duties, it is
16 clear that most of her time is spent working alongside the
17 recreation assistant and the recreation aide. The NLRB
18 consistently holds that employees who spend most of their
19 time working alongside other employees are not supervisors
20 within the meaning of the act.¹ While working alongside of
21 the recreation assistant and recreation aide the work that
22 Ms. Scott does in assigning and directing them is done "in
23 the interest of the patient". When Scott substitutes for
24 Jessen her work "in the interest of the patient" is
25 broadened to include the Education Department as a whole
26 rather than just the recreation unit. Even without the
27

28
29
30 ¹Cousins Associates, Inc., 125 NLRB No. 15, 1063,
31 enf'd. CA 2, 46 LRRM 3045 (1960), Aspen Skiing Corporation,
32 Case No. 27-RC-2389, 143 NLRB No. 76, 53 LRRM 1397, July 22,
1963, Hamilton Tool Co., 61 NLRB 1361, 16 LRRM 156 (1945),
Legion Legion Utensils Co., 109 NLRB, No. 187, 34 LRRM 1580
(1954).

1 distinction between "the interests of the patient" and the
2 "interests of the employer", spasmodic and infrequent
3 assumption of a position of command and responsibility does
4 not transform an otherwise rank and file worker into a
5 "supervisor."²

6 Applying the various tests for supervisory status to
7 Ms. Scott's job duties show that in the main, the superviso-
8 ry duties she performs are either performed "in the interest
9 of the patient", sporadically, or are reviewed to the extent
10 that Ms. Scott must be considered a leadworker or a
11 supervisor "in the interest of the patient" rather than "in
12 the interest of the employer".

13 The determination of whether this position is super-
14 visory "in the interests of the employer" is not a deter-
15 mination of the value of the position. Ms. Scott performs
16 significant duties assigning and directing employees "in the
17 interest of the patients". She may continue to do so
18 without affecting her status as a member of the bargaining
19 unit.

20 CONCLUSION OF LAW

21 The position of recreation therapist now held by Dallas
22 Scott is not a supervisory position within the meaning of
23 39-31-103(3) MCA.

24 RECOMMENDED ORDER

25 The petition to exclude the position of recreation
26 therapist from the bargaining unit of developmental training
27 specialists, special education teachers, speech
28

29
30
31
32 ²NLRB v. Quincy Steel Casting Co., CA 1, 31 LRRM 2148
(1952).

1 pathologists, recreation specialists, recreation therapists,
2 teacher aides and rehabilitation aides is dismissed.

3 NOTICE

4 Written exceptions to these Findings of Facts, Con-
5 clusions of Law and Recommended Order may be filed within
6 twenty days. If no exceptions are filed with the Board of
7 Personnel Appeals within that time, the Recommended Order
8 shall become the Order of the Board. Exceptions shall be
9 addressed to the Board of Personnel Appeals, Capitol Sta-
10 tion, Helena, MT 59620.

11 Dated this 15th day of April, 1985.

12 BOARD OF PERSONNEL APPEALS

13
14 By Linda Skaar
15 LINDA SKAAR
16 Hearing Examiner

17 * * * * *

18 CERTIFICATE OF MAILING

19 I, Linda Skaar, do certify that a true
20 and correct copy of this document was mailed to the follow-
ing on the 15th day of April, 1985.

21 Labor Relations Bureau
22 Department of Administration
23 Room 130, Mitchell Building
24 Helena, MT 59620

25 Emilie Loring
26 Hilley & Loring, P.C.
27 121 4th Street North
28 Suite 2 G
29 Great Falls, MT 59401
30
31
32

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